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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 215

WILLIS K. BAKER, JR., and
MERVIN "BUD" CORNELSEN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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In the Supreme Court
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No.

WILLIS K. BAKER, JR., and
MERVIN "BUD" CORNELSEN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners Willis K. Baker, Jr., and Mervin Cornelsen pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which was rendered and entered April 4, 1968, and which affirmed their convictions; and to review the judgment of said court rendered and entered May 21, 1968, which denied their petition for rehearing.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported but is printed in Appendix E annexed hereto.

JURISDICTION

On June 3, 1966, in No. 4269-ND in the District Court of the United States for the Eastern District of California, a jury found both petitioners Willis K. Baker and Mervin Cornelsen guilty under Count I of an indictment of conspiracy to violate 18 U.S.C. Section 641 (conspiracy to receive stolen United States property);[1] and also found petitioner Baker guilty, under Count III of violation of 18 U.S.C. Section 641 (receiving stolen United States property). Petitioners were sentenced July 5, 1966. The United States Court of Appeals for the Ninth Circuit rendered and entered its judgment affirming the convictions on April 4, 1968. (Appendix A). Their petition for rehearing[2] was denied by judgment rendered and entered therein on May 21, 1968. (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). (Appendix C).

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[1]Violation of 18 U.S.C. Section 371, but harmlessly mislabeled in the indictment as violation of 18 U.S.C. Section 641.

[2]Duly filed May 3, 1968.

QUESTIONS PRESENTED

The questions presented for review are:

(1) Is scienter (knowledge that the property received had been stolen from the United States), an essential element of the federal crimes of conspiracy to receive,[3] and receiving,[4] stolen United States property?

(2) Does the following anti-reasonable doubt instruction constitute plain error?

> "There is nothing different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them."

(3) When a co-defendant pleads guilty and becomes a probation seeker, and in the meantime he is to be the chief prosecution witness against the remaining co-defendants,

(a) Does Fifth Amendment due process require reasonable postponement of the trial of remaining defendants until after the trial court decides such probation application, in order to prune the inducement to testify falsely which has become inherent in the situation?

(b) Does Fifth Amendment due process, and the Sixth Amendment witness confrontation clause, prohibit deliberate disclosure to the jury, by the prosecution, that such prosecution witness

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[3] 18 U.S.C. Section 371, conspiracy to violate 18 U.S.C. Section 641.

[4] 18 U.S.C. Section 641.

is a co-defendant who pleaded guilty to the identical conspiracy accusation?

(c) Otherwise, in such situation, does needless postponement of the probation hearing until after the trial of remaining co-defendants, and deliberate disclosure to the jury of the co-conspirator's guilty plea, constitute plain error?

RULE 19 STATEMENT

The special and important reasons for a review on writ of certiorari are as follows:

(1) The Court of Appeals' decision was, in effect, that scienter (knowledge that the property had been stolen from the United States), is *not* an element of the crimes of conspiracy to violate, and violation of, 18 U.S.C. Section 641.

(a) Such decision of that federal question is in direct conflict with applicable decisions of this court, *Morissette v. United States,* 342 U.S. 246;[5] and *Kirby v. United States,* 174 U.S. 47, at 53 and 64:[6]

> ". . . (I)t was incumbent upon the government, to establish its charge against Kirby, to establish beyond reasonable doubt: . . . (3) that he received or retained it with knowledge that it had been stolen from the United States."
>
> ". . . If the stamps were in fact stolen from the United States, and if they were received by the

[5]Theft and conversion of United States property, 18 Stats. at L. 479, Chap. 144, now 18 U.S.C. Section 641.

[6]Receiving stolen United States property, 18 U.S.C. Section 641.

> accused . . . with the intent to convert them to his own use or gain, and knowing that they had been stolen from the United States, he could be found guilty of the crime charged . . ."

(b) Such decision of that federal question is in direct conflict with the decision of other courts of appeals on the same matter, as follows:

Receiving Offense: Cohn v. United States (2d Cir.), 258 Fed. 355, at 358;[7] *Souza v. United States* (9th Cir.), 304 Fed.(2d) 274, 276-277;[8]

Conspiracy-to-Receive Offense: United States v. Sherman (2d Cir.), 171 Fed.(2d) 619, 623-624;[9] *United States v. Crimmins,* (2d Cir.), 123 Fed.(2d) 271, at 272 and 273;[10] *Linde v. United States* (8th Cir.), 13 Fed.(2d) 59, 61[11];

Receiving, and Conspiracy-to-Receive Offenses: Davidson v. United States (2d Cir.), 61 Fed.(2d) 250, at 253-256;[12] *Tomley v. United States* (5th Cir.), 250 Fed.(2d) 549, 553.[13] As to the Seventh Circuit, see

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[7]Receiving stolen United States property, 18 Stats. at L. 479, Chap. 144.

[8]Sale of stolen United States property, 18 U.S.C. Section 641.

[9]Conspiracy to conceal goods stolen from foreign commerce.

[10]Conspiracy to transport securities stolen from interstate commerce, 18 U.S.C. Section 415.

[11]Conspiracy to receive autos stolen and transported in interstate commerce, National Motor Theft Act.

[12]Receiving, and conspiracy to receive, auto stolen and transported in interstate commerce, National Motor Theft Act.

[13]Receiving, and conspiracy to receive, stolen United States property, 18 U.S.C. Section 641.

LaBuy, *Manual of Jury Instructions in Federal Criminal Cases,* 1965, page 263. (Appendix D).[14]

and

(c) Such decision of the Ninth Circuit is upon an important question of federal law which has not, but should be, settled by this Court, in that the federal courts of appeal are presently in utter conflict, in that:

Some federal cases hold that in substantive receiving cases the prosecution must prove knowledge that the stolen goods received were federally protected when stolen, *Kirby v. United States,* 174 U.S. at 53 and 64; *Cohn v. United States* (2d Cir.), 258 Fed. at 358; *Souza v. United States* (9th Cir.), 304 Fed.(2d) at 276-277; other federal cases hold that such knowledge is not essential in a substantive receiving charge, but is essential in a conspiracy-to-receive charge, *United States v. Sherman* (2d Cir.), 171 Fed.(2d) at 623-624; *United States v. Crimmins* (2d Cir.), 123 Fed.(2d) at 272 and 273; and still other federal cases hold that such knowledge is not at all essential to prove either a substantive or conspiracy charge, *Loftus v. United States* (2d Cir.), 46 Fed.(2d) 841, 847; *Kasle v. United States* (6th Cir.), 233 Fed.(2d) 878, 882.

(2) In respect to the anti-reasonable doubt instruction, the decision of the court of appeals is in direct conflict with applicable decisions of this Court,

---

[14]Containing standard Seventh Circuit instructions on receiving, and conspiracy to receive, stolen United States property, 18 U.S.C. Section 641.

and of other courts of appeals; and constitutes a sanction of a departure by a lower court from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

(3) In respect to the postponement by the trial court of the probation hearing involving the co-defendant prosecution witness, and in respect to the deliberate disclosure by the prosecution of the guilty plea of such co-defendant prosecution witness, the court of appeals has decided an important question of law which has not been, but should be, settled by this Court.

STATUTES INVOLVED

This case involves 18 U.S.C. Section 641; 18 U.S.C. Section 371; the due process clause of the Fifth Amendment, United States Constitution; the jury trial and confrontation by witnesses clauses of the Sixth Amendment, United States Constitution; the jury clause, Article III, Section 2, United States Constitution. The pertinent provisions thereof are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner Willis K. Baker, Jr., a licensed commercial pilot[15] was engaged as owner and operator in the business of aerial forest firefighting (RT 823),

[15]Reporter's Transcript 822 (hereinafter called RT).

under direct contract with the United States Forest Service and the State of California. (RT 823-824). The business owned its own B-17, a Northrup F-15A Black Widow, a North American T-28, and a North American B-26, each costing from $35,000 to $40,000. (RT 826-827). His company employed 12 people, and was based at Fresno Airport where the company had a radio shack. (RT 827-828). Co-defendant Mervin Cornelsen was one of the employees. (RT 828).

On April 7, 1966, an indictment was filed in the United States District Court for the (now) Eastern Division District of California,[16] charging in Count I that between August through December 21, 1965, Baker and Cornelsen, as well as Roger Stephenson and Charles Rush, conspired:

> ". . . to commit an offense against the United States in violation of Title 18, Section 641, (sic),[17] to wit: the defendants did . . . conspire . . . to receive, to conceal, and retain, with intent to convert to their own use, and gain, and to dispose of a quantity of aircraft instruments and parts, radio receivers and transmitters and three ARN 21-units, property belonging to the United States Naval Air Station at Lemoore, California, as the defendants knew . . ." (CT 2-3).

In Count II, Rush alone was charged with theft of this United States property, therein alleged to be of more than $100 in value.[18] (CT 3).

---

[16]Clerk's Transcript 2-5, (hereinafter called CT).

[17]Actually, violation of 18 U.S.C. Section 371.

[18]18 U.S.C. Section 641.

In Count III, Baker alone was charged with receiving this stolen United States property, therein alleged to be more than $100 in value.[19]

On April 11, 1966, co-defendant Stephenson pleaded guilty to Count I, conspiracy to receive. (CT 6). The other defendants pleaded not guilty the same day. (CT 6). Jury trial was set for one month later, May 11, 1966; but Stephenson's probation hearing was continued past such trial date to May 23, 1966. (CT 6). On May 11, 1966, the trial date was continued to May 24, 1966. (CT 7). Thus on May 23, 1966, the day before the trial, Stephenson appeared for his probation hearing; at which time his probation hearing was continued on motion of Stephenson to June 6, 1966. (Docket, CT 150). Jury trial of Rush and of petitioners Baker and Cornelsen, commenced the next day, May 24, 1966. (CT 8).

(For the purposes of this petition it is assumed arguendo that the prosecution during the trial proved satisfactorily that Rush stole the United States property involved from Lemoore Naval Air Station.)

Stephenson was the chief prosecution witness, his testimony comprising some 210 pages of trial transcript (RT 384-427, 435-602), interspersed by testimony by his attorney Richard W. Nichols that Nichols had written a letter to the counsel for petitioners on March 4, 1966, stating:

> "I have been contacted by a representative of the United States Attorney's office and . . . a proposi-

[19] 18 U.S.C. Section 641.

tion has been made which Mr. Stephenson feels is to his benefit and which he desires to accept." (RT 428).

When called by the Government, the very first testimony of the probation-seeking Stephenson was:

"Q. Mr. Stephenson, are you the Roger Lee Stephenson who is named in the indictment in this case as a co-conspirator in Count One?

A. Yes, sir.

Q. And have you already entered a plea to that indictment?

A. Yes; I have.

Q. And what was your plea?

A. Guilty." (RT 384-385).

Counsel for both petitioners immediately objected:

"If Your Honor please, I submit that the questions asked and the answers elicited by prosecutor are misconduct. He has no right to ask any such questions at the outset of this witness' testimony . . ." (RT 385).

(Counsel for petitioners did move for mistrial while Stephenson was still on the stand, on the grounds that:

("A prior conviction or plea of guilty by a confederate is not admissible against an accused . . . Now that is what we have here . . . Therefore, Your Honor, I respectfully move the Court for a mistrial on that ground." (RT 421).

(The mistrial motion was denied. (RT 422).

(The mistrial motion was futile, for as soon as defense counsel heard the testimony and objected, the trial judge replied:

("THE COURT. Certainly the jury is entitled to have this information, so I see nothing wrong with it, counsel." (RT 385).)

Stephenson then testified that he received the equipment from Rush and sold and delivered it to Baker as surplus military equipment (RT 384-427); that Cornelsen was present at some of the conversations and received some of the items on behalf of Baker. (RT 384-427). Stephenson at first testified that he told Baker that the items were stolen (RT 446); but on cross-examination Stephenson admitted he had told counsel for petitioners on a prior occasion that Stephenson had not told Baker that this property was stolen (RT 472); that:

> "I would say, no, I didn't ever actually come out and tell them it was stolen . . . It was more assumed between all of us it was stolen property." (RT 572-573).

Another government witness, John Alvey, a former employee of Baker, testified he saw petitioners painting some radio equipment at Baker's Fresno airport radio shop; that he asked if the stuff was "hot" and they replied, "Everything was taken care of and don't sweat about it," and that the equipment was "warm". (RT 606-608; 660).

Petitioners both testified in their own behalf, denying they knew the property was stolen, or stolen from the United States. (RT 820-913; 914-975). Summarizing, they testified that the transactions were purchases of apparently legitimate surplus parts and equipment, at market prices, paid for by checks, and

used in the business of Baker or sold elsewhere in the course of business.

The Navy witness who established the theft of the items, Lt. Ericksen, testified that the material involved was not secret or classified, and nothing about the appearance of the units involved would indicate they were stolen. (RT 257; 271).

The Government argued to the jury:

> "I believe the judge will instruct you that it isn't even necessary that they know it's stolen Government property; all they have to know is that this property is stolen. All they have to know is that Mr. Stephenson does not have the property rightfully; where he got it or how he got it isn't important. . . ." (RT 1154).

Then the trial court instructed the jury:

> "It is not necessary that the Government prove that the defendants knew that the property belonged to the United States; it is only necessary to prove that the property belonged to the United States and that the defendants knew it was stolen.
>
> "I'm not sure I read that correctly—It is not necessary that the Government prove that the defendants knew that the property belonged to the United States; it is only necessary to prove that the property did belong to the United States and that the defendants knew it was stolen." (RT 1283).

The trial court at the close of instructions told the jury:

> "There is nothing different in the way a jury is to consider the proof in a criminal case from that

in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense . . ." (RT 1286).

No objection to these instructions is shown in the record.

The jury deliberated from 10:55 A.M. to 4:30 P.M., with one hour for lunch, and returned their verdict finding all defendants guilty as charged. (RT 1289-1291; CT 124-125).

On July 5, 1966, motion for new trial was made on behalf of petitioners, the grounds of which included the points that:

"We urge that the court should not have permitted the defendant Stephenson to testify under the circumstances that existed in this case." (RT 1306).

"(W)e do feel that there was no substantial evidence of knowledge on the part of these defendants, that they knew the property was stolen . . ." (RT 1306-1307).

The same points were included in the notice of motion for new trial (CT 132-133), as was:

"The Court erred in charging the jury . . ." (CT 133).

Upon denial of motion for new trial, Baker was sentenced on July 5, 1966, to two years imprisonment and fined $10,000 on Count I, and two years imprisonment only in Count III, to run concurrently (CT 140); and Cornelsen that same day was sentenced to

two years imprisonment on Count I, the first six months to be served in a "jail-type institution" and execution of remaining 1½ years imprisonment suspended. (CT 138).

The thief Rush was given two years only, concurrently, on each of Counts I and II, with no fine. (CT 139).

Stephenson received probation for three years, with a $1,700 fine payable $50 per month. (Docket entry for June 6, 1966, on page following CT 150).

Petitioners filed their respective notices of appeal from their convictions on July 12, 1966. (CT 144, 146). In their Appellant's Opening Brief,[20] petitioners set forth the specific points that the trial court erred in denying the mistrial by reason of Stephenson's testimony re his guilty plea to the same indictment (Opening Brief 15); that the trial court erred in permitting Stephenson to testify over objection by appellants (Opening Brief); and that the anti-reasonable doubt instruction mentioned hereinbefore was plain error (Opening Brief, 22, 24-25).

The Ninth Circuit Court of Appeals affirmed the convictions of petitioners Baker and Cornelsen on April 4, 1968. (Volume I, Supreme Court Transcript of Record; Appendix A, E).

Petitioners duly filed their petition for rehearing May 3, 1968, again expressly urging the anti-reasonable doubt instruction (Rehearing petition 1), and also now urging specifically that it was plain error to

[20]Hereinafter called Opening Brief.

twice instruct the jury, and to allow the prosecution to argue, that it was not necessary for the Government to prove that the defendants knew that the stolen property belonged to the United States. (Rehearing petition 3). The Petition for Rehearing was ordered denied on May 21, 1968. (Volume I, Supreme Court Transcript of Record, Appendix B).

ARGUMENT

I. SINCE CONSPIRACY REQUIRES AN INTENT TO COMMIT AN OFFENSE "AGAINST THE UNITED STATES, OR TO DEFRAUD THE UNITED STATES", KNOWLEDGE THAT THE PROPERTY WAS STOLEN FROM THE UNITED STATES IS AN EXPRESS ELEMENT OF SUCH FEDERAL CRIME.

18 U.S.C. Section 371.

See the cases in accord, in the Rule 19 Statement portion of this petition.

II. SUCH KNOWLEDGE OF THEFT OF THE PROPERTY FROM THE UNITED STATES IS ESSENTIAL TO CONSTITUTE ANY FEDERAL MENS REA.

See *Nassif v. United States,* 370 Fed.(2d) 147, expressly voicing this view that, otherwise, there is nothing more than a state crime.

III. THE MORISSETTE AND KIRBY CASES HAVE NEVER BEEN OVERRULED AND SHOULD BE FOLLOWED, NOT IGNORED, BY THE LOWER FEDERAL COURTS.

Morissette v. United States, 342 U.S. 246; *Kirby v. United States,* 174 U.S. 47, 53, 64; and *Souza v.*

United States (9th Cir.), 304 Fed.(2d) 274, at 276-277:

> ". . . (W)e believe that the reasoning of the Supreme Court compels the conclusion that criminal intent is an essential element of the offenses . . ." (of selling United States property in violation of the 18 U.S.C. Section 641)

which case approved the following:

> ". . . the jury (was) instructed that . . . each sale or conveyance was made by appellant . . . with knowledge that the property had been stolen from the United States . . ."

IV. THE ANTI-REASONABLE DOUBT INSTRUCTION IN THIS CLOSE CASE WAS A DYNAMITE INSTRUCTION WHICH PREVENTED A FAIR TRIAL.

The proper reasonable doubt instruction is well-known. *Norwitt v. United States,* 195 Fed.(2d) 127, 134; *Williams v. United States,* 271 Fed.(2d) 703, 704; *Henderson v. United States,* 243 Fed.(2d) 681, 682; *Rose v. United States,* 149 Fed.(2d) 755, 759; *United States v. Belisle,* 107 Fed. Supp. 283, 285.

This anti-reasonable doubt instruction was the last instruction of any consequence in the case, and gave the jury exactly the wrong idea of the burden of proof required to convict.

V. THE MISINSTRUCTIONS IN THIS CASE DEPRIVED PETITIONERS OF THEIR RIGHT TO HAVE THE ISSUES OF SCIENTER AND REASONABLE DOUBT DECIDED BY A JURY, CONTRARY TO THE JURY TRIAL CLAUSES OF THE SIXTH AMENDMENT AND OF ARTICLE III, SECTION 2, UNITED STATES CONSTITUTION.

"In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, . . . for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach v. United States,* 326 U.S. 607, 615.

VI. SUCH GUILTY PLEA HAVING BEEN MADE WITHOUT ANY OPPORTUNITY TO PETITIONERS TO CROSS-EXAMINE IT AT THE TIME IT WAS MADE, SUCH EVIDENCE OF SUCH GUILTY PLEAS DEPRIVED PETITIONERS OF THEIR SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST THEM.

Kirby v. United States, 174 U.S. 47, recognized this long ago. The cases clearly rule this is reversible error. *Babb v. United States,* 218 Fed.(2d) 538; *United States v. Toner,* 173 Fed.(2d) 140; *United States v. Hall,* 178 Fed.(2d) 853.

In view of *Pickens v. Oliver* ..... U.S. ....., No. 1076, October Term, 1967, decided recently, allowing such evidence of the hearsay guilty plea at the trial of co-defendants violated the Sixth Amendment of the petitioners even when accompanied by a cautionary instruction not to consider it as evidence.

VII. THE POSTPONEMENT OF PROBATION DECISION IN RESPECT TO PROSECUTION WITNESS STEPHENSON RESULTED IN AN UNFAIR TRIAL, CONTRARY TO DUE PROCESS.

As the record shows, Stephenson was equivocal in his testimony and retreated readily on cross-examination from earlier testimony that he told petitioners the goods were stolen. Had there been no imagination or hope on his part that he might get probation, then his testimony would have been different. Since the trial could easily have been held after the probation ruling on Stephenson, which would have removed any inducement for Stephenson to "color" his testimony, the trial court should not have allowed the trial to precede the probation ruling.

Of course there are situations in which courts cannot postpone the trial. But where as here the trial court can easily make the trial fairer by rendering his ruling on probation prior to trial, the trial judge should do so; failure so to do violates self-evident fundamental standards of fair trial.

VIII. THE PLAIN ERROR RULE APPLIES IN THIS CASE IN THOSE RESPECTS WHERE THE RECORD WAS UNPROTECTED.

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350; *Hormel v. Helvering,* 312 U.S. 552, 557; *Wiborg v. United States,* 163 U.S. 632, 658; *Crawford v. United States,* 212 U.S. 183; *Mahler v. Eby,* 264 U.S. 32, 45; *Brasfield v. United States,* 272 U.S. 448, 450.

SUMMARY

For the reasons given, this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated, San Francisco, California,
June 18, 1968.

Respectfully submitted,
GEORGE T. DAVIS,
Attorney for Petitioners.

(Appendices A, B, C, D and E Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 21,318-A

Willis K. Baker, Jr.,	Appellant,
vs.	
United States of America,	Appellee.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 4, 1968.

United States Court of Appeals
For the Ninth Circuit

No. 21,318-B

Mervin "Bud" Cornelsen,	Appellant,
vs.	
United States of America,	Appellee.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 4, 1968.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 21,318-A, B

Excerpt from Proceedings of Tuesday, May 21, 1968

Before: MADDEN, Judge of the Court of Claims, and HAMLEY and MERRILL, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellants filed May 3, 1968, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

Appendix C

UNITED STATES CONSTITUTION

Article III, Section 2:

"... The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury ..."

Fifth Amendment:

"... (N)or shall any person ... be deprived of life, liberty, or property, without due process of law; ..."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and ... to be confronted with the witnesses against him ..."

* * * *

18 U.S.C. Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. Section 641:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both . . ." June 25, 1948, c. 645, 62 Stat. 725.

28 U.S.C. Section 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ." June 25, 1948, c. 646, 62 Stat. 928.

Appendix D

Jury Instructions in Federal Cases (Seventh Circuit Judicial Conference Committee on Jury Instructions, Judge Walter J. LaBuy, Chairman):

"Section 19.01—Offense of Stealing Government Property

"Defendant has been indicted for the crime of stealing property of the United States. To convict defendant of this crime the Government must prove beyond a reasonable doubt that defendant unlawfully took without authority property owned by the United States, with knowledge that the property belonged to the United States, and with the specific intent to deprive the Government of its use.

"Section 19.02—Offense of Unauthorized Sale of Government Property

"Defendant has been indicted for the crime of selling property of the United States without authority. To convict defendant of this crime the Government must prove beyond a reasonable doubt that defendant sold or disposed of property of the United States without authority to do so, and with knowledge that the property was owned by and was stolen from the United States.

"Section 19.03—Offense of Receiving Stolen Government Property

"Defendant has been indicted for the crime of receiving, concealing or retaining property stolen from the United States. To convict defendant of this crime the Government must prove beyond a reasonable doubt that defendant received, concealed, or retained property owned by the United States with the intent to convert such property to his own use, and with knowledge that it has been stolen from the United States."

Appendix E

United States Court of Appeals
For the Ninth Circuit

Willis K. Baker, Jr., and Mervin "Bud" Cornelsen, Appellants, vs. United States of America, Appellee.	No. 21318-A 21318-B

[April 4, 1968]

Appeal from the United States District Court
for the Eastern District of California

Before: MADDEN, Judge of the Court of Claims, and HAMLEY and MERRILL, Circuit Judges

HAMLEY, Circuit Judge:

Count one of a three-count indictment, filed on April 7, 1966, charged Charles Raymond Rush, Roger Lee Stephenson, Willis Kingsley Baker, Jr., and Mervin "Bud" Cornelsen, under 18 U.S.C. §§ 371 and 641 (1964), with conspiracy to receive, conceal and convert stolen government property to their own use. Count two of the indictment charged Rush with stealing a quantity of government property in violation of 18 U.S.C. § 641. Count three charged Baker with receiving, concealing and converting a quantity of government property in violation of 18 U.S.C. § 641.

Stephenson pleaded guilty to count one, the only count involving him. Rush, Baker and Cornelsen pleaded not guilty to the counts in which they were individually named. These three were jointly tried before a jury. Rush was convicted on counts one and two. Baker was convicted on counts one and three. Cornelsen was convicted on count one. Baker and Cornelsen jointly appeal.

Baker was the owner of an aircraft parts and supply company, known as Aero Enterprises, located at the Fresno Airport, Fresno, California. Cornelsen was one of his employees. Stephenson was a cement mason apprentice in Fresno. In 1963 Stephenson met Rush, who was an employee at the Lemoore Naval Air Station. Rush worked as a stockman in the stowage branch in the aviation warehouse. In that position he had complete access to a wide range of military equipment, including radio and navigational components for aircraft. Stephenson was also acquainted with Baker and Cornelsen.

In the summer of 1965, Stephenson purchased from Rush some altimeters for use in sport parachuting. He found that they were too sensitive to use for jumping and therefore sold them to Baker on August 30, 1965. Stephenson sold various aviation items to Baker from time to time, after having acquired them from Rush. Cornelsen was present while several of these transactions between Stephenson and Baker were consummated. Rush had stolen some of these items from Lemoore Naval Air Station's supply department.

The circumstances under which Baker purchased these items and under which he and Cornelsen dealt with the items after purchase led the jury to find Baker guilty on the receiving, concealing and converting count, and both Baker and Cornelsen guilty on the conspiracy count.

On appeal Baker argues that the district court erred in denying his motion for a separate trial on count three of the indictment charging him alone with receiving and concealing stolen government property. Baker alleges that the joinder of count three with count two, charging Rush with stealing the same property, was an impermissible joinder of defendants under Rule 8(b), Federal Rules of Criminal Procedure.

Rule 8(b) permits the joinder of multiple defendants only where it is alleged that they have "participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The rule provides, however, that "all of the defendants need not be charged in each count."

Here counts two and three, the substantive counts, and count one, the conspiracy count, considered together, all arise out of the same series of transactions in which all of the defendants allegedly participated. Where this is the case, the joinder, in one indictment, of the conspiracy count and substantive counts is permissible under Rule 8(b). See *Schaffer v. United States,* 362 U.S. 511, 513; *Williamson v. United States,* 9 Cir., 310 F.2d 192, 197 n. 16; *Hill v. United States,* 9 Cir., 306 F.2d 245, 247.

Baker also asserts that the trial court should have granted his motion for severance and separate trial of count three under Rule 14, Federal Rules of Criminal Procedure, because of prejudice to himself stemming from the joinder of defendants and offenses.

Baker first argues that he was prejudiced because a confession of one of the defendants was introduced in evidence against him. But the only defendants who were tried with Baker were Cornelsen and Rush, and neither of them made a confession. Although Stephenson's confession was introduced into evidence, it was introduced by Baker in an attempt to impeach Stephenson's testimony. Thus, the introduction of the confession was not hearsay and the joinder of defendants created no prejudice in this regard.

Baker also asserts, in effect, that prejudice is probable in a case where two offenses are joined because a defendant may wish, as a practical matter, to testify on one count and remain silent on the other. However, Baker makes no contention that this was his wish in this case, and that the joinder thwarted such tactics.

Baker suggests several other reasons why, in his view, actual or potential prejudice resulted from failure to grant him a separate trial on count three of the indictment. We have examined each of these and conclude that no substantial actual or probable prejudice has been demonstrated. While Rule 14 permits the trial court to order severance of either offenses or defendants if it appears that a defendant may be prejudiced by joinder, the failure of the court to order severance is not a basis for reversal absent a

clear abuse of discretion. *Mendez v. United States,* 9 Cir., 349 F.2d 650, 652. We find no abuse of discretion in this regard.

Baker contends that the trial court abused its discretion in denying his repeated motions for a speedy trial.

The first three-count indictment was filed on January 19, 1966. On February 18, 1966, Baker and Cornelsen moved to dismiss count one of that indictment (conspiracy). At the same time Baker moved for a separate and speedy trial as to him on count three (receiving and concealing) in the event count one was dismissed. On February 28, 1966, both motions were granted and, whereas a joint trial had been set for May 11, 1966, a separate trial for Baker on count three was then set for April 5, 1966.

On March 10, 1966, the Government filed a superseding indictment containing the same three counts, but with some revision of count one. The Government then moved to vacate the April 5, 1966 trial setting on count three of the first indictment, stating that, in view of the superseding indictment, the Government would not prosecute under the first indictment. The district court thereupon vacated the April 5, 1966 trial setting, and ordered a joint trial of all three defendants on all counts of the superseding indictment for May 11, 1966.

On April 4, 1966, Baker moved for an early and separate trial of count three of the superseding indictment. On April 7, 1966, before the above motion was argued, the Government filed a second three-count

superseding indictment. Again there were revisions in count one of the indictment. On April 11, 1966, Stephenson entered a plea of guilty on count one (conspiracy), and May 23, 1966 was fixed as the date of his presentence report. As noted above, Baker, Cornelsen and Rush pleaded not guilty on all counts affecting them.

Baker's motion for severance was argued and denied on April 11, 1966. Counsel for Rush moved that the trial date be postponed from May 11, 1966 to the first or second week of June. But Baker and Cornelsen preferred to hold the May 11, 1966 trial date and the Government indicated satisfaction with that date. The court therefore retained the May 11, 1966 trial setting.

On May 11, 1966, Baker and Cornelsen appeared in court ready for trial. They were met by a motion for a continuance filed by the Government that morning, without prior service on opposing counsel. The trial court, however, apparently had been given advance notice of the motion for a continuance since, prior to May 11, 1966, the jury panel had been instructed not to appear on that day. The motion was made on the ground that the Government had been unable to serve a subpoena on one of its witnesses. Baker and Cornelsen strenuously resisted the motion for continuance, but the order was granted and the trial was continued to May 24, 1966. The case went to trial on that day.

The continuance from May 11 to May 24, 1966, was for such a short period of time that it could not, in our view, constitute a denial of appellants' Sixth

Amendment right to a speedy trial. We similarly conclude with regard to the delay from April 5, 1966, once set as the trial date for Baker, to the May 24, 1966 trial date.

Baker and Cornelsen also appear to argue, in effect, that the trial court abused its discretion in granting the continuance. However, no prejudice is alleged to have resulted from this continuance whether deemed to be from April 5, or May 11, 1966. We hold that the trial court did not err in setting the trial for May 24, 1966, rather than an earlier date.

Baker and Cornelsen contend that the court erred in denying their motions for acquittal, made at the close of the Government's case and renewed at the close of all the evidence. The motions were made on the ground that the evidence was insufficient to support the verdicts of guilty. On appeal, one argument which appellants make in support of this contention is that the evidence failed to establish beyond a reasonable doubt that Baker and Cornelsen knew the property in question had been stolen.

The brief on appeal, filed by the office of the United States Attorney, contains numerous misstatements, all favorable to the Government, concerning the evidence pertaining to knowledge. However, each of these misstatements has been carefully noted and thoroughly documented in appellants' reply brief and, in addition, we have made our own examination of the record.

The evidence on the question of whether Baker and Cornelsen knew that the property had been stolen is largely circumstantial. There is a good deal of such

evidence which tends to indicate that Baker and Cornelsen did not have such knowledge. On the other hand, there is substantial circumstantial evidence to the contrary.

Among items of evidence in the latter category is the testimony of Douglas Wood that when he asked Baker if the equipment was "hot," Baker replied, "No, it's a little warm"; the testimony of John Alvey that when he asked appellants if the stuff was "hot," they replied, "Everything was taken care of and don't sweat about it," and that the equipment was "warm"; the testimony of Rush that Cornelsen joined with Stephenson in attempting to induce Rush to take parts from Lemoore Naval Air Station; and the testimony of Stephenson that, in a conversation with Baker and Cornelsen, the Lemoore source of the items was mentioned and, during the conversation, Baker gave Stephenson a list of the specific items he could use. Many other items of evidence tended to show guilty knowledge if the jury chose to accept the version presented by some witnesses and reject the exculpatory explanations offered by other witnesses.

Viewing the evidence in the light most favorable to the Government, as we are required to do on this appeal, we conclude that reasonable minds could find, beyond a reasonable doubt, that Baker and Cornelsen knew that the government property had been stolen.

Appellants also argue that the evidence is insufficient on the conspiracy count in that it failed to establish a concert of action by Baker, Cornelsen and

Rush. In our opinion, the testimony concerning the meeting which Stephenson had with Baker and Cornelsen in September 1965, provides ample evidence of concert of action between Baker, Cornelsen, Stephenson and some person in the supply department at Lemoore who may then have been unknown to Baker and Cornelsen. It is not material whether, during the course of the conspiracy, Baker and Cornelsen knew that the fourth conspirator was Rush. See *Rogers v. United States,* 340 U.S. 367, 375; *Lile v. United States,* 9 Cir., 264 F.2d 278, 281.

Another point appellants urge on the question of the sufficiency of the evidence is that, whereas the indictment charges them with having received an ARN-21 unit, serial no. AAZ2222 on or about October 5, 1965, the evidence shows that this unit was in the Government's own hands at least as late as November 1, 1965. We reserve discussion of this argument to a later point in this opinion where the matter of a discrepancy between indictments will be dealt with.

Finally, on the question of the sufficiency of the evidence, Cornelsen points out that he did not himself buy any of the property and argues that if there was a receiving and concealing of the property it was by his employer Baker, and not by Cornelsen, who was Baker's employee.

An employee who assists his employer in receiving and concealing stolen property purchased by the employee, is not necessarily guilty of aiding and abetting a violation of 18 U.S.C. § 671, or of conspiring to commit such an offense. But if, as the evidence pertaining

to Cornelsen tends to show, he has knowledge that the property has been stolen and that his employer intends to convert it to his own use, and if he conspires with his employer and others to effectuate that plan and actively participates therein, he is guilty of engaging in an unlawful conspiracy as defined in 18 U.S.C. §371. We think the evidence is sufficient to support the jury finding that Cornelsen engaged in such a conspiracy.

We conclude that the trial court did not err in denying appellants' motions for acquittal, made on the ground that the evidence is insufficient.

Before, during and after the trial Baker contended that the indictment charged him with two crimes involving the same activity. Specifically, he asserted that count one (conspiracy) and count three (receiving, concealing and converting government property) were identical offenses. All of his efforts made on this ground, to dismiss one count or the other, to compel an election, to instruct the jury on the point, and to grant a new trial, were denied. Baker argues that the trial court erred in denying such relief.

Baker's position on this point is premised on the view that in order to convict him under count three it was necessary to prove that Rush stole the subject property, that Stephenson delivered the property to Baker, and that Baker received it, with knowledge of the theft, for his own use—and that these are the exact same elements required to prove the conspiracy charged in count one.

In order to convict Baker of the substantive offense set out in count three, all the Government had to prove was that he received government property from Stephenson, knowing that it was stolen, with intent to convert it to his own use. In order to prove the conspiracy offense set out in count one, the Government had to prove that Baker conspired with Stephenson, Cornelsen and Rush to commit the substantive offense. The commission of the substantive offense and the conspiracy to commit it are two separate and distinct offenses, and a conviction on the substantive count does not merge the conspiracy count. *Pinkerton v. United States,* 328 U.S. 640, 643-644; *Hill v. United States,* 9 Cir., 306 F.2d 245, 247.

However, where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy. See *Gebardi v. United States,* 287 U.S. 112, 122. Thus Baker could not have been convicted of conspiring with Stephenson alone to receive stolen government property, since Baker received the property from Stephenson. But where a conspiracy contemplates the cooperation of a greater number of parties than are necessary to the commission of the principal offense, the one who commits the principal offense may be convicted of that offense and also the conspiracy. See *Gebardi,* 287 U.S. at 122, n. 6; *Reno v. United States,* 5 Cir., 317 F.2d 499, 503-504.

Here there was evidence sufficient to warrant a jury finding that Baker conspired with Stephenson, Cor-

nelsen and Rush to commit the substantive offense involving Baker's reception and conversion of stolen property from Stephenson. The two charges are therefore not identical and the district court did not err in denying Baker relief on that ground.

Appellants contend that the court erred in receiving, over their objection, evidence pertaining to three ARN-21 units which had been stolen from Lemoore.

Prior to trial the court granted a motion to suppress certain evidence seized as the result of an unlawful search on December 21, 1965, at Fresno, California.[1] The order also suppressed "all evidence obtained directly or indirectly from the search and seizure made pursuant to said search warrant." The three ARN-21 units were seized after the unlawful search at Allied Aircraft Sales in Phoenix, Arizona. Appellants contend that the Government obtained the information which led to the discovery of these items as a result of interrogating Baker and Cornelsen during the course of the unlawful search. They argue that introduction in evidence of these items was therefore in violation of the court's suppression order and the Supreme Court ruling in *Wong Sun v. United States,* 371 U.S. 471, 485.

John David Carroll, one of the F.B.I. agents who conducted the unlawful search, testified that on the morning of December 21, 1965, shortly before the

[1]The unlawfulness of the search and seizure resulted from the fact that the search was conducted on premises totally separate and distinct from the premises described in the search warrant.

search was made on that day, he conversed with one John Alvey and learned that three ARN-21 units had been shipped to Robert "Gallagher" in Phoenix, Arizona. The correct spelling of this name is "Gallaher." According to Carroll, Alvey at this time also mentioned Allied Aircraft, located on Washington Street in Phoenix. Carroll further testified that, during the search, he asked Baker if he had any records on the shipment of equipment and supplies to Phoenix, and Baker replied that he had shipped some things to Gallaher but did not have any records on this. The name of Allied Aircraft and Gallaher's connection with that company must have come up during this conversation because Carroll testified that Baker and Cornelsen told him that Phoenix, Arizona, was a sufficient address to reach Gallaher.

The trial court denied the motion to suppress. Later in the trial, when Alvey was on the witness stand, counsel for Cornelsen handed him a copy of a report, dated December 27, 1965, which Carroll had prepared concerning his conversation with Alvey described above. Alvey stated that the report correctly reflected his conversation with Carroll. Among other things, the report stated that Alvey said Baker sold some radios to Bob "Gallagher" on Washington Street, in Phoenix, Arizona.

Directing Alvey's attention to the "12-23-65" date (two days after the unlawful search) which appeared at the bottom of the report, counsel asked Alvey if that was "about" the date when Alvey conversed with Carroll. Alvey replied, "It's possible."

In urging that the court erred in receiving evidence concerning the three ARN-21 units, appellants assert that Alvey's testimony, described above, shows that Carroll did not receive any information from Alvey until two days after the unlawful search. Hence, they urge, Carroll must have received his first information concerning the whereabouts of these units during his conversation with Baker and Cornelsen at the time of the search.

We do not agree. In the first paragraph of Carroll's report of December 27, 1965, he stated that his conversation with Alvey occurred on December 21, 1965. But when Cornelsen's counsel asked Alvey to state the date of the conversation, he directed Alvey's attention not to the December 21, 1965 date, but to the "12-23-65" date which appeared at the bottom of the report. That date, however, was not intended to indicate the date of the conversation, since it read: "Date dictated 12-23-65." Thus Alvey was misled, albeit, inadvertently, in eliciting his recollection as to the date of the conversation. Even then, Alvey did not state categorically that the conversation occurred on December 23, 1965. All he said was, "It's possible."

Appellants also rely on some other circumstances in arguing that the Government received essential information concerning the whereabouts of the ARN-21 units during interrogation of Baker and Cornelsen at the time of the unlawful search. One of these is that Carroll's report made no mention of any ARN-21 units. This is immaterial. The report indicated that Alvey told Carroll that Baker had sold some radios

to Bob "Gallagher" of Allied Aircraft, on Washington Street in Phoenix, Arizona. This was enough of a lead to take the government agents to that address.

This observation also negates any possible significance arising from the fact that, during the unlawful search, Carroll was told that with the name "Allied Aircraft," there was no need of obtaining a street address in Phoenix. Carroll had obtained an adequate address from Alvey. The fact that, in his conversation with Carroll, Alvey referred to a "Gallagher" instead of "Gallaher" is likewise without significance.

The trial court did not err in receiving these exhibits in evidence.

Appellants also predicate error upon a curious discrepancy in indictments which was discovered during the course of the trial.

Count one of the original indictment, returned on January 19, 1966, charging a conspiracy, alleged three overt acts, all occurring on or about September 24, 1965. The first alleged overt act was the theft, by Rush, of one ARN-21 unit from Lemoore, serial number AAZ2222. The second alleged overt act was the delivery of one ARN-21 unit by Stephenson to Baker on or about the same day, and the third alleged overt act was the receiving and concealment of "the above stated property" by Baker and Cornelsen on or about the same day. While no serial number was stated with respect to the second and third overt acts, the words "the above stated property" and the identity of dates indicates that all three overt acts were concerned with an ARN-21 unit, serial number AAZ2222. The descrip-

tion of the three overt acts set out in the conspiracy count of the first superseding indictment was identical with that contained in the first indictment.

The case was tried on a second superseding indictment, filed on April 7, 1966. In count one of that indictment (conspiracy), three overt acts are set out, all occurring on or about October 5, 1965. Each of these three overt acts relates to three ARN-21 units, but no serial number is given for any of them. However, the copies of that indictment which the clerk of the district court handed to counsel for Baker and Cornelsen prior to the trial contains the notation "Serial No. AA22222" after the reference to the three ARN-21 units referred to in the first overt act (stealing by Rush) of the conspiracy count.[2]

During the Government's case it was established that an ARN-21 unit, serial number AAZ2222, was in the possession of the Government at Lemoore on November 1, 1965. At the close of the Government's case, defendants moved for acquittal, one ground being that the Government had failed to prove, as alleged in count one of defendants' copy of the indictment, that all three ARN-21 units, serial number AAZ2222, had been stolen, delivered, received and concealed "on or about October 5, 1965." The court, having before it the correct form of the indictment showing no serial number, denied the motion.

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[2]It will be noted that the serial number set out in the copies of the third indictment handed to defendants varied somewhat from the serial number referred to in the first overt act alleged in the first two indictments, "AA22222" being used instead of AAZ2222. However, as Baker's attorney recognized at the trial, the first "2" was a typographical error and the serial number should have read "AAZ2222" as in the first two indictments.

Immediately thereafter, a colloquy occurred during which the discrepancy between the indictments came to light.[3] On the basis of this revelation, counsel for Baker and Cornelsen immediately renewed their motions for acquittal or dismissal. The court denied the motions, pointing out that the correct form of the indictment had been read aloud in court at the outset of the trial and that defendants could not therefore complain that they were unaware of the fact that the overt acts did not refer to any particular serial number.

On this appeal defendants argue that they were so prejudiced by the described discrepancy in indictments that the court erred in denying their motions for acquittal or dismissal. They urge that, based upon the form of the indictment which had been supplied to them, one of their chief defenses was the fact that an ARN-21 unit, serial number AAZ2222, was still in Government hands in November 1965, and therefore could not have been stolen, delivered, received and concealed "on or about October 5, 1965." This defense, they argue, was undermined by the fact, unknown to them until the end of the Government's case at the trial, that the overt acts alleged in the true indictment did not refer to ARN-21 units of any particular serial number.

An observation is first in order concerning the fact that, in the copies of the indictment supplied to de-

[3]The Government attorney explained to the court that he had intended to remove this serial number when he modified the second indictment in drafting the third indictment. However, through some error, the serial number, while omitted from the copy signed by the jury foreman and used by the court, was retained in the copies given to Baker and Cornelsen.

fendants, the serial number AAZ2222 followed a reference to three ARN-21 units, rather than a single ARN-21 unit, as in the first two indictments.

It is common knowledge that individual devices and appliances are given individual serial numbers, and that two or more such items would not carry the same serial number. Moreover, defendants knew from the allegations of the first two indictments that serial number AAZ2222 was intended to identify only one ARN-21 unit. Accordingly, we do not believe that Baker and Cornelsen were misled into believing that the serial number, stated with regard to the first overt act in the copy of the indictment handed to them, was intended to identify all three ARN-21 units referred to in that alleged overt act. They were, however, entitled to believe that one of the ARN-21 units carried that serial number.

As stated above, the evidence shows that an ARN-21 unit, with serial number AAZ2222, was in the possession of the Government at Lemoore on November 1, 1965. However, the Government proved that, later that month, this unit was on the premises of Baker's Aero Enterprises in Fresno.[4] Thus, the Government actually did prove the allegations of the form of indictment handed defendants that these overt acts occurred with respect to an ARN-21 unit, serial number

[4]Robert A. Gallaher, with Allied Aircraft Sales, Phoenix, Arizona, testified at the 1966 trial that he saw a unit with that serial number, and two other ARN-21 units, at Baker's Fresno shop "[i]n November of last year," that he talked to Baker and Cornelsen about them, and that, at that time, he purchased the three ARN-21 units from Baker for about $350 each.

AAZ2222, unless the time variance between "on or about October 5, 1967," as alleged in that indictment, and sometime in November 1965, after November 1, as shown by the evidence, calls for a different conclusion.

Defendants were charged with having participated in a conspiracy which began about August 1965, and continued to about December 21, 1965. The overt acts alleged in the indictment concerning ARN-21 units were proved to have been committed during that period. This being the case, the fact that some of these acts, namely those concerning one of the three ARN-21 units, occurred sometime during the last twenty-nine days of November 1965, rather than "on or about October 5, 1965," is, in our opinion, an immaterial and non-prejudicial variance.

Our conclusion in this respect finds support in *Strauss v. United States,* 5 Cir., 311 F.2d 926, 932. In that case the indictment alleged that the overt acts, whereby co-defendant Goodman drew specified checks on a particular bank, occurred between November 8, 1957 and March 27, 1958. The proof showed that the checks had been drawn between June 3 and August 29, 1957. The court held that under the circumstances, this variance in proof did not prejudice the defense, observing that a substantial similarity between the facts alleged in the overt act and those proved is all that is required.

Baker and Cornelsen were therefore not entitled to rely, as a substantial defense, upon the fact that they could prove the overt acts concerning one of these

ARN-21 units did not take place on or about October 5, 1965, as compared to the later day shown by the evidence. Accordingly, they were not misled by the copies of the indictments supplied to them into depending upon a substantial defense which was not available under the true form of the indictment. The trial court did not err in denying the motions for acquittal or dismissal based on the discrepancy between indictments.

The views just expressed also call for rejection of defendants' contention that, because ARN-21, serial number AAZ2222 was still in the possession of the Government on November 1, 1965, the evidence is insufficient on the conspiracy count.

At the outset of the testimony of Stephenson, an alleged co-conspirator and witness for the Government, the fact was elicited, in response to a direct question from the United States Attorney, that Stephenson had pleaded guilty. Immediate objection was made thereto on the ground that this constituted misconduct, but the objection was overruled. At the first opportunity a motion for mistrial was made upon the same ground but was denied. In its charge to the jury, the court instructed that the jury could not consider the guilty plea of Stephenson "as evidence against any of the other defendants," and that this evidence could be considered only "when you are determining whether or not Mr. Stephenson told the truth when he testified in this court room."

Appellants contend that the trial court erred in denying the motion for a mistrial, and that such error

was not cured by the described instruction given at the close of the case.

The general rule is that guilty pleas of co-defendants cannot be considered as evidence against those on trial. *United States v. Restaino,* 3 Cir., 369 F.2d 544, 545. The reasoning here is that a defendant is entitled to have the question of his guilt determined upon the evidence against him, not on whether a Government witness or co-defendant has pleaded guilty to the same charge. *Babb v. United States,* 5 Cir., 218 F.2d 538, 542.

The question remains, however, whether the error in receiving in evidence Stephenson's statement that he had pleaded guilty, was prejudicial under the circumstances of this case.

The trial court did not, as in *United States v. Toner,* 3 Cir., 173 F.2d 140, or *United States v. Hall,* 2 Cir., 178 F.2d 853, instruct the jury that it could take into consideration in determining the guilt of an alleged conspirator the fact that an alleged co-conspirator had pleaded guilty. As indicated above, the trial court did just the opposite—it instructed that this evidence was not to be considered in passing upon defendants' guilt. No case has been called to our attention where, in the face of such a cautionary instruction, reversible error has been declared.

Moreover, in the case before us, the statement obtained from Stephenson that he had pleaded guilty added nothing of substance to the information the jury obtained as a result of other evidence. In the

course of his direct testimony Stephenson thoroughly implicated himself. In cross-examination of Stephenson, counsel for Baker put in evidence, and cross-examined Stephenson concerning, the report of F.B.I. agent Carroll summarizing his interview with Stephenson. During this interview Stephenson told of delivering items to Baker and Cornelsen which Stephenson knew had been stolen. Baker's counsel also cross-examined Stephenson as to the latter's understanding of what he had pleaded guilty to.

We hold that the court did not err in denying defendants' motion for a mistrial made on the basis of Stephenson's testimony that he had pleaded guilty.

Appellants question the giving of certain instructions, and the failure to give other requested instructions.

Having in view the instructions as a whole, and the objections thereto which were taken on behalf of defendants, we find no prejudicial error with respect to the instructions given, and the failure to give requested instructions.

The remaining assignments of error have been examined and have been found to be without merit.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIS K. BAKER, JR., and MERVIN "BUD" CORNELSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 215

WILLIS K. BAKER, JR., and MERVIN "BUD" CORNELSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. E) is reported at 393 F. 2d 604.

JURISDICTION

The judgments of the court of appeals (Pet. App. A) were entered on April 4, 1968. A petition for rehearing was denied on May 21, 1968. The petition

for a writ of certiorari was filed on June 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in its instructions relating to the scienter requirement or the reasonable doubt standard.

2. Whether petitioners were prejudiced because a co-defendant who had pleaded guilty was permitted to testify against them prior to being sentenced.

3. Whether it was error to permit the co-defendant to state, at the beginning of his direct testimony, that he had pleaded guilty.

STATEMENT

After trial by jury in the Southern District of California, petitioners were convicted on one count of conspiring with others, Rush and Stephenson, to violate 18 U.S.C. 641 by receiving and converting stolen government property. Petitioner Baker was sentenced to two years' imprisonment and fined $10,000 on the conspiracy count,[1] and Cornelsen to two years' imprisonment, with all but the first six months suspended.

Baker was the proprietor of an aircraft parts and supply company, and Cornelsen was one of his employees (IX R. 917). The evidence showed that Rush,

[1] Baker was also convicted of a substantive count of receiving stolen government property in violation of Section 641 and given a concurrent sentence of two years' imprisonment.

a stockman in the stowage branch of the aviation warehouse at the Lemoore Naval Air Station (V R. 196), stole items of equipment from the warehouse and sold them to Stephenson, who in turn resold them to petitioners. The first transactions involved parachutes and altimeters (VI R. 387-390). Thereafter, Baker indicated to Stephenson that he was interested in aircraft instruments and would purchase all of the instruments which Stephenson could supply (VI R. 393). After a time, to ensure obtaining equipment for which they would have a market, petitioners furnished Stephenson with written lists of specific aircraft components which they wanted (VI R. 398). When Rush furnished items which were similar to those requested on the lists, but not the exact parts desired, Cornelsen met with him and Stephenson and explained that in the future he would provide federal stock numbers, which he said he had a way of obtaining, in order to insure that he was getting the exact items desired (VI R. 406-408). It was also decided at this meeting to make no further purchases for a time because Rush informed them of a pending investigation at the air station (VI R. 409).

At one point, Baker inquired of Stephenson whether his source was making sales to others. When Stephenson replied that he thought so, Baker suggested that if the source could sell to them alone, the chances of discovery would be reduced (VI R. 399). On another occasion, Cornelsen, in Baker's presence, suggested to Stephenson that "[y]ou ought to have your boy cool it or be careful" (VI R. 405). Petitioners and Stephenson would remove all government markings and

labels from the items and their containers when Stephenson delivered them, and would remove and burn the packing data and stock labels (VI R. 402-404). Cornelsen explained that by scraping the labels off they would be able to save the barrels and containers for future use, and anyone who might "pay us a visit" would not "see what's on them" (VI R. 406). An employee of Baker, observing petitioners painting over the government labels on expensive equipment that looked too new to be surplus, inquired whether the items were "hot" and was told that everything was taken care of and not to worry about it (VII R. 606-608). Another individual who asked Baker if an item of equipment which Baker offered him for sale was "hot" (because he also had seen petitioners painting over the identification numbers) was informed that it was "a little warm" (VI R. 320-324). Stephenson testified that, while he never actually stated to petitioners that the items he was supplying were stolen property (VII R. 572), everybody concerned assumed that they were stolen (VII R. 572-574, 584) because they came in the original government containers with government tags attached (VII R. 585).

ARGUMENT

1.*a.* The trial court instructed the jury that it had to find that the items in question belonged to the United States and that petitioners knew that they were stolen, but did not instruct that petitioners must have known that they were stolen from the United States (XI R. 1283). There was no objection to the

instruction. Indeed, petitioners' counsel submitted a proposed scienter instruction to the trial court that made no mention of the necessity of proving knowledge that the stolen property was government-owned (I R. 72). The alleged error in the instruction was first urged in a petition for rehearing in the court of appeals. The court of appeals understandably did not discuss the point. Under the circumstances, the decision below does not, as petitioners contend, necessarily conflict with decisions holding that knowledge that the property belonged to the United States is an element of a charge of conspiring to violate 18 U.S.C. 641. Moreover, the Ninth Circuit itself has indicated that knowledge that property was stolen from the United States is an element of even a substantive offense under 18 U.S.C. 641. *Souza* v. *United States*, 304 F.2d 274 (C.A. 9).

Accordingly, the issue here is actually whether the trial court's error in instructing on the scienter element was of such dimension that this Court should reverse the convictions despite the absence of objection at trial and the failure to raise the issue on appeal. See *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. There is, we submit, no occasion for such action by this Court. While petitioners defended on the claim that they did not know the property was stolen, this issue was resolved against them on ample evidence. The government's evidence showing that petitioners knew the property was stolen—which the jury credited—necessarily showed that petitioners knew the property was stolen from the United States.

b. Toward the conclusion of its instructions, the trial court said (XI R. 1286):

> There is nothing different in the way a jury is to consider proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

This was followed immediately by the words: "If the accused be guilty, beyond a reasonable doubt, say so. If not, say so" (XI R. 1286). No objection was made by petitioners' counsel. If there were any possibility of confusion to the jury, petitioners had a duty to point it out to the court so that the court could have instructed further and removed the confusion. It is, however, clear that the court's concluding instruction did not conflict with or derogate in any manner from the usual instruction on reasonable doubt which it had previously given (XI R. 1264). Petitioners' extraction of one sentence in the instructions out of context, and characterization of that sentence as an "anti-reasonable doubt instruction" (*e.g.*, Pet. 6), is thus unjustifiable and misleading.

2. After Stephenson's plea of guilty and petitioners' pleas of not guilty, trial was set for May 11, 1966, and Stephenson's sentencing was set for May 23 (I R. 6). Stephenson, upon pleading guilty, had filed a motion for probation (VI R. 434). On May 11, the trial was continued until May 24 because a key government witness was not available (I R. 7). On

May 23, the sentencing of Stephenson was continued, on his motion, until June 6 (I R. 150; VI R. 437). Petitioners made no objection to Stephenson's appearance as a witness until their motion for a new trial (XII R. 1306). They urged before trial, however, that the fact that he would not be sentenced until after he testified gave them the right to take his deposition (III R. 81). Contrary to petitioners' contention, there is no rule rendering an unsentenced accomplice incompetent to testify, or requiring the reversal of a conviction based upon his testimony in the absence of proof of actual perjury (which is not offered here). *Lemons* v. *United States*, 339 F.2d 761, 764 (C.A. 9), certiorari denied, 380 U.S. 985; see *Cobb* v. *United States*, pending on petition for certiorari, No. 231, this Term. Nor was there any reason to permit petitioners to use the deposition process with respect to Stephenson in advance of trial.

3. At the beginning of Stephenson's testimony, the prosecutor elicited his admission that he had pleaded guilty (VI R. 384-385). Petitioners' counsel objected, and at the start of cross-examination moved for a mistrial, which was denied (VI R. 420-422). The trial court thereafter instructed the jury that it could not consider Stephenson's guilty plea as evidence against petitioners, but could consider it only in respect to determining the witness's veracity (XI R. 1271-1272). In light of this cautionary instruction, receipt of Stephenson's testimony was not erroneous. *Jiron* v. *United States*, 306 F.2d 946, 947 (C.A. 10). In such a situation, there is error only if the cautionary instruction is not given

(*Babb* v. *United States*, 218 F.2d 538, 541-542 (C.A. 5)), or if the jury is instructed that it can consider the guilty plea as evidence against the defendant. *United States* v. *Toner*, 173 F.2d 140, 142 (C.A. 3). This was not a case where the conviction, guilty plea or confession of an accomplice was used as hearsay evidence, thus precluding any opportunity for cross-examination, as in the cases on which petitioners rely (Pet. 17). *Kirby* v. *United States*, 174 U.S. 47, 53-54; *Pickens* v. *Oliver*, No. 1076, 1967 Term, decided June 10, 1968; *United States* v. *Hall*, 178 F.2d 853, 854 (C.A. 2). Stephenson was available for and was subjected to cross-examination by petitioners' counsel.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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